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NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

BENNY DIXON,

Appellant-Petitioner

-vs-

ROBERT R. RAINES,

Appellee-Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Benny Dixon
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Petitioner Propria Personam

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1. Does petitioner's failure to timely object to grand jury proceedings constitute an independent and adequate state procedural ground barring review of this issue?

2. Since petitioner told the trial court the morning before his trial that he was ready to proceed, did the trial court abuse its discretion by refusing to grant a continuance?

3. Can petitioner show infringement of a federally protected right based on the trial court's ruling admitting evidence of petitioner's prior convictions?

4. Is review of allegedly improper comments by the prosecutor barred by defense counsel's failure to object to any of them?

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MEMORANDUM OF POINTS AND AUTHORITIES

REASONS FOR GRANTING THE WRIT

Reply to Respondent Argument I

In reply to Respondent's submission that failure of the Petitioner to timely raise complaints pertaining to grand jury proceedings constitutes an independent and adequate state procedural ground that bars review, Petitioner opposes and replies as follows:

Petitioner alledges and has substantiated by court documented fact that he is imprisoned upon a charge which he in fact has not been indicted upon. Respectfully, Petitioner invites the Court's attention to transcript of grand jury hearing September 5, 1979, Appendix M, previously submitted. Specifically, Id. at p.4, lines 8 through 20.

Prosecutor

Q. On the 25th of June was there a third purchase made?

Witness--Agent Saenz

A. Yes, there was.

A perusal of the charging indictment reveals no such date as June 25, 1979. The third count instead lists a date of June 20, 1979 and substantiates Petitioner's claim that the charging indictment upon which he was tried and convicted has been and was impermissably altered, causing a conviction to be had upon a crime not submitted to the grand jurors which found the True Bill. Petitioner respectfully submits for the consideration of the Court that a person cannot be convicted of an offense not charged against him by indictment or information. State v. Rogers, (1976) 113 Ariz. 6, 545 P.2d 930. The fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Miller v. Pate, 386

U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 690 (1967). Not to be found upon the face of the charging indictment upon which the Petitioner was tried and convicted is an offense dated June 25th, 1979. The Respondent stipulates that the Petitioner is correct, but that state's material witness to the alledged crimes (Agent Jesse Ochoa) testified to a crime alledged to have occurred on June 20th 1979. Respondent's submission substantiates an impermissably altered grand jury indictment contravening U.S.C.A., Amendment Five. Just as there is a lack of due process and a failure of a fair hearing when evidence is presented to grand jury by an unauthorized person acting as prosecuting attorney, there is a lack of due process and an injury to system when a county attorney improperly attempts to influence actions of a grand jury. 17 A.R.S., Rules of Crim. Proc., Rule 100, 103, 169. State v. Good, 460 P.2d 622, 10 Ariz. App. 556. A person cannot be convicted of an offense not charged against him by indictment or information. State v. Rogers, (1976) 113 Ariz. 6, 545 P.2d 930. Agent Saenz, the witness that testified at the grand jury hearing, was not a material witness to the crimes alledged; the grand jurors were not appraised of such, nor did Agent Saenz appear at the defendant's trial. His sworn testimony was different (admitted by Respondent) than the testimony given at the Defendant's trial by state witness, Agent Ochoa. Compare United States v. Jett, C.A. Mass. (1974) 491 F.2d 1048. There the grand jurors were fully appraised of the nature of the testimony, the reason and informed that the witness would be available to testify at trial. The United States Supreme Court held in Fay v. Noia, 83 S.Ct. 822, 372 U.S. 391 that Habeas Corpus lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but is void, and therefore Res Judicata is inapplicable in a Habeas Corpus proceeding. The courts have consistently ruled that a waiver of fundamental error must be knowingly and intelligently waived by the defendant. Humphrey v. Cady, (1972) 92 S.Ct. 1048, 405 U.S. 504, 31 L.Ed. 2d 394; Mata v. Summer, 611 F.2d 754 (9th Cir. 1979). A conviction

may be set aside despite a lack of objection at trial if fundamental error was committed; fundamental error is such error as goes to the foundation of the case or which takes from the defendant a right essential to his defense: denial of a fair trial would be such error. State v. Nettz, 114 Ariz. 296, 560 P.2d 814. Grand jury procedures must satisfy the requirements of federal and state constitutional and statutory guarantees. Petitioner respectfully submits that the grand jury proceedings contravened the confrontation clause, U.S.C.A., Amend. Six, which states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Arizona Rules of Evidence, Rule 103(d) states:

> "Nothing in this rule precludes taking notice of errors affecting fundamental rights, although they were not brought to the attention of the court."

Based upon the foregoing, and the previously submitted contentions, factually documented, Petitioner Moves this Court, which is the guardian of the Petitioner's constitutional rights, to grant the writ and reverse the sentence and conviction found upon an unconstitutionally amended indictment.

Reply to Respondent Argument II

The trial court did abuse its discretion in denying Petitioner a continuance when Petitioner proceeded Pro Se until the morning of the trial.

Respondent submits that the day before trial, Petitioner stated that he was ready to proceed; however, he fails to inform the Court that the predawn alert held the day before trial was presided over by the Honorable Judge, Norman S. Fenton, who was afterwards affidavited, and that the defendant was not bound by the previous statement of readiness. Petitioner respectfully submits for the consideration of the Court that an announcement of ready for trial before a disqualified judge does not amount to waiver. N.Y. People v. Harper, 124 N.Y.S. 12, 139 App. Div. 344. Particular circumstances may control in determining whether the request is made in time, or should be granted, although not made in time. N.D. State v. Chase, 117 N.W. 537, 17 N.D. 429, 17 Ann. Cas. N.D. Here the defendant expressly stated to the trial court, Id at R.T., Nov. 7, 1980, p.8, lines 18 through 25, Appendix A-1, incorporated herein by reference thereto.

Defendant

> "Your Honor, I would like to present to the Court a continuance until I can receive the information on the reconsideration motion that was presented by the County Attorney's office. I am in the process of trying to get a transcript of that hearing, and it is pertinent to my case."

The Court, l. 24 and 25

> "I really don't understand what you are asking for, Mr. Dixon."

The dialog, appertaining to the defendant's request for a continuance in order to obtain a transcript of the bond reconsideration hearing at which the state's witness, Agent Ochoa, had previously testified continued, and substantiates that: (1) the trial court is not familiar with the prior proceedings held in the case. (2) The request is in fact not a manipulati ↄ, but based upon a substantial need. (3) The pretrial hearing before the court is de nevo in every respect, the defendant having not appeared before the trial court previously.

(4) The case record substantiates that no previous continuances had been sought. Based upon the circumstances, Petitioner submits for the consideration of the Court that the court's denial of the requested continuance constitutes an abuse of discretion. Where an important member of a partnership is involved in a trial and one of its attorneys is engaged in another court, denial of a motion for continuance is an abuse of discretion and reversable error. Camelback Partners v. Weber, 9 Ariz. App. 452, 453 P.2d 548 (1969). Petitioner, further, respectfully submits that the trial court's denial of the defendant's request for a continuance contravened Arizona Rules of Criminal Procedure, Rule 16.6, Omnibus Hearing. Subsection a., Scope of Proceeding, states:

> "The court shall hold an omnibus hearing unless it determines that the hearing will not serve a useful purpose in a particular case. [Emphasis added] The court shall:
>
> (1) Hear all motions made at or prior to the hearing;
>
> (2) Obtain stipulations to facts relevant to the case;
>
> (3) Consider and determine any other matters which will promote a fair and expeditious trial; and
>
> (4) Set such further hearings for the taking of evidence or argument of motions as are needed.

There had been no prehearing conference which is made mandatory by Arizona Rules of Criminal Procedure, Rule 16.5(A). The denial of a continuance based upon the defendant's request substantiating good cause, and the state's non-compliance with Ariz. R. Crim. Proc. Rules 16.5,6 and subsections, constitutes a denial of substantive due process of law, a denial of procedural due process, and equal protection of the law contravening the 5th, 6th, and 14th Amendments of the United States Constitution. Based upon the foregoing, Petitioner respectfully submits that he was denied a fair trial as

guaranteed by U.S.C.A. and the constitution and laws of the State of Arizona. This Court has held that whether or not denial of a continuance amounts to a violation of due process depends upon the totality of circumstances and the reasons presented to the trial judge at the time the request was made. Here the circumstances substantiated are: (1) the defendant's stated need for the state's testifying witness's testimony at a previous hearing. (2) The defendant stated to the trial judge that the witness's testimony was pertinent to the case. (3) There had been no previous request for a continuance. (4) The trial judge had no prior factual knowledge of the case as indicated from the transcript of the November 7, 1979 pretrial hearing, excerpt appendix A-I, included herein. Respondent submits that the transcript was provided within 24 hours, but fails to state, as substantiated by court record, that the defendant, representing himself, was denied the requested transcript. Respondent further submits that considering four face to face sales to Officer Ochoa and the fact that Petitioner has parts of fingers missing from his right hand, the Arizona Court of Appeals concluded that his defense was totally destroyed and that a continuance would not have diminished the overwhelming evidence against the Petitioner. Respectfully submitted for the consideration of the Court is the fact that Petitioner did request a transcript of Agent Ochoa's testimony and that said request was denied. Said denial is reversable error. State v. Tomlinson, 121 Ariz. 313, 589 P.2d 1345 (1978). Petitioner respectfully submits that the overwhelming evidence introduced at trial to the effect that Petitioner had missing fingers is absent from the identification made by Office Ochoa under oath at the Reconsideration of Bond Hearing held September 7, 1979, Appendix B-I, incorporated herein by reference thereto. Absent from the record of this case is a disclosure appertaining to the person with whom Agent Ochoa dealt or the Petitioner having parts of fingers on the right hand missing. See police reports, Appendix C-I, incorporated herein by reference thereto.

The foregoing documents that Agent Ochoa did not disclose that the person with whom he dealt had parts of fingers missing. Agent Smith, who was Agent Ochoa's back-up and servailance person on all four sales occasions, testified at Petitioner's trial that he did not know that the Petitioner had parts of fingers missing until the day of his arrest, and further documents that Agent Ochoa never revealed to him that the person with whom he had dealt had parts of fingers missing. See excerpt of November 8, 1979 trial transcript, Appendix D-I, incorporated herein by reference thereto, Id at R.T. of Nov. 8, 1979, p. 117, lines 4 through 13.

Defense Counsel

Q. Officer, are you telling the jury that on either May the 23rd or June the 14th or June the 20th or June the 22nd, you were close enough to see that Mr. Dixon didn't have any fingers on his hand, or is it based upon examination of him here in the court room?

Agent Smith

A. No, sir, it is based upon the day that the arrest was made. There were no other persons that were arrested on the day of the arrest that....

Petitioner respectfully submits that the foregoing factualizes and substantiates that the Petitioner's defense was prejudiced by the trial court's denial of a continuance based upon the Petitioner's stated need to acquire a transcript of a hearing wherein the state's witness (Officer Ochoa) had given testimony, that testimony being different from the testimony given at Petitioner's trial. This Court stated in Feretta v. California (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562, through the opinion delivered by Mr. Justice Stewart: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the

the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be accorded compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation--to make one's own defense personally--is thus necessarily impled by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. Petitioner respectfully submits that the denial of the request for a continuance totally destroyed the right to self-represenation guaranteed by U.S.C.A., Amendment Six.

Petitioner respectfully submits that the pre trial motions filed pro per and the public defender's motion to withdraw substantiate that the defendant/Petitioner herein intended to represent himself. See Motion to Dismiss Indictment, Motion to Proceed Pro Per and later Appointment of Counsel, Application for Withdrawal and R.T. of proceedings, October 15, 1979. Appendix E-I through H-I, incorporated herein by reference thereto. Appendix A-I, refutes Respondent's submission that the trial court denied the motion but ordered a transcript prepared within 24 hours (R.T. of Nov. 7, 1979 at 13). Petitioner respectfully submits for the consideration of the Court that based upon the court's denial of a transcript of the witness's testimony, there having been no evidentiary or omnibus hearing, any sane person (respectfully) whould have relinquished self-representation. The appointment of the Public Defender's Office once again, after the withdrawal motion had been granted (Appendix G-I) in fact thrust counsel upon the defendant, under the prevailing circumstances. Where public defender has been relieved of duty and new counsel appointed for accused, public defender had no standing to bring motion for his reappointment, and court was without jurisdiction to grant motion. State v. Madrid (1970) 105 Ariz. 534, 468 P.2d 561. Criminal defendant

has the right to adequate and effective assistance of counsel, and that right necessarily includes allowance to counsel of reasonable time to prepare defense. State v. McWilliams, (1968) 103 Ariz. 500, 446 P.2d 229.

Based upon the foregoing, Petitioner submits, respectfully, that he was denied a fair trial in contravention of Amendments Five, Six and Fourteen, U.S.C.A.

Reply to Respondent Argument III

RULINGS ON ADMISSIBILITY OF EVIDENCE ARE MATTERS FOR THE STATE COURT AND PETITIONER CAN SHOW NO VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT

Respondent submits that at trial the state sought to impeach Petitioner's credibility by introducing previous convictions, since Petitioner denied that he had ever seen the undercover officer whom he was accused of selling heroin to on four separate and different occasions; Petitioner's credibility was of paramount importance. Petitioner respectfully submits for the consideration of the Court that the trial court's ruling under Rule 609(A), Arizona Rules of Evidence, constitutes a violation of substantive due process of law, and denied Petitioner a fair trial, contravening Amendments 5, 6, and 14, U.S.C.A. Rule 609(A) "Impeachment by Evidence of Conviction of Crime" states:

> General Rule
> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted

or (2) involved dishonesty or false statement, regardless of the punishment.

The rule explicity states if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect [emphasis added]. The rule states nothing to the effect of a persons credibility being of paramount importance. The basis for the trial court's ruling itself contravenes the logical reason for the rule. The rule is not designed to find out who is and who is not telling the truth. Both Agent Ochoa and the defendant testified under oath. Petitioner respectfully submits for the consideration of the Court that if the prior convictions proved that the defendant was lying, he would have then had a perjury charge. Here, the prior conviction of burglary and grant theft occurred in 1967, a period of time exceeding twelve years. What possible probative value would a twelve year old crime of burglary and grand theft have on the alledged charges? The June, 1979 conviction of possession of heroin for sale occurred in October of 1978, sentencing minute entry, Appendix I-1, incorporated herein by reference thereto, had absolutely no probative value in regards to the alledged sale charges. Petitioner had been granted appeal bond upon sentencing, the trial and sentencing court finding that probable cause existed to believe that the conviction could be set aside or reversed on appe[illegible] admission of evidence relating to same was overwhelmingly prejudicial to the defendant/petitioner herein. The defense motion in limine. Appendix J-I, incorporated herein by reference thereto, should have been granted, and constitutes reversable error. Id. at R.T., Nov. 8, 1979 at p. 139 lines 11 through 19, excerpt Appendix K-I, incorporated herein by reference thereto:

The Court

The Court finds--I hereby make an explicit finding that the prejudical effect of the evidence of both prior convictions is outweighed by the probative value of those convictions, so I will allow the

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> State to use them, and I further rule that as far as I know, the State versus Sorrel is still the law and the rules of evidence have not changed that, and those facts may be brought out in addition to the other facts.

Petitioner has been unable to find a State versus Sorrel. Respondent's submission that the Petitioner's credibility was of paramount importance is right on point with Petitioner's contention. The defendant being charged with four counts of sales of narcotic to an undercover agent, all occurring on different dates, and placed before one jury, is itself prejudicial. The court held in State v. McClellan, 125 Ariz. 595, 611 P.2d 948 that as the state did not sustain its burden, the motion in limine should have been granted. The error requires reversal, as appellant's credibility was crucial to his defense. Criminal Law Key 1170½(1). Error in admitting two prior 1972 convictions in Massachusetts for purposes of impeaching defendant was of a reversable nature where defendant's credibility was crucial to his defense. 17 A.R.S. Rules of Evid., Rule 609, 609(A). Admissibility of evidence is a matter of state law, and presents no constitutional question unless there is an error of such magnitude that it denies Petitioner fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), Cert. Denied, 393 U.S. 889 (1968). Petitioner submits for the consideration of the court that State v. McClellan, supra, is the controlling law applicable to Arizona Rules of Evidence, Rule 609, 609(A) and based upon same, Petitioner was denied fundamental due process, substantive due process of law and equal protection of the law, all in contravention and violation of Petitioner's guarded rights, Amendments 5, 6 and 14, U.S.C.A., constituting reversable error.

Reply to Respondent Argument IV

PETITIONER WAIVED ANY OBJECTION TO PROSECUTORIAL COMMENTS BY FAILING TO OBJECT TIMELY.

Id., R.T., Nov. 9th (excerpt Appendix L-I, incorporated herein by reference thereto) at p.47 line 1 through 3, the state prosecutor in closing argument states to the jurors:

> State Prosecutor
>
> Head-on, collidng with the truth told you by the officers is the testimony of Benny Dixon, a convicted felon.

There was no corroboration to Agent Ochoa's testimony and identification of the accused, Benny Dixon, being the person with whom he had dealt with at the three on four separate occasions, as previously documented by Agent Smith's testimony, who was agent Ochoa's backup on all four sales occasions. Respondent does not contest the prejudicial effect of the statement; instead Respondent contends that defense counsel did not object. Petitioner, respectfully, asks this Court what possible objection could have possibly cured the prejudicial effects of the state prosecutor's statement? Defendant's counsel specifically moved for a mistrial. Id., R.T. of Nov. 9, 1979 at p.56 through 59, Appendix M-I, incorporated herein by reference thereto. The Fourteenth Amendment of the Constitution of the United States is a restriction upon the methods used in state courts which violate the due process clause of that amendment. U.S.C.A., Const. Amends. 4, 5, 14. State v. Berg, 259 P.2d 261, 76 Ariz. 96. Respondent submits that failure of Petitioner's counsel to object constitutes waiver for purposes of federal relief. Petitioner respectfully submits that the Court ruled in Humphrey v. Cady, 1972, 92 S.Ct. 1048, 405 U.S. 504, 31, L.Ed. 2d 394 (Mr. Justice Marshall speaking for the Court) that waivers of state court remedies such as will bar Habeas Corpus must be the product of an understanding and knowing

decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel.

Reply to Respondent Argument V

PETITIONER DID IN FACT MAIL A TIMELY NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT

Petitioner respectfully reiterates the contentions submitted previously, appertaining to the filing of a timely notice of appeal in the United States District Court. Petitioner's Motion to Rehear was timely filed; Petitioner appealed from the United States District Court Order dated FEbruary 11, 1981 denying Motion to Rehear; Notice of Appeal was dated and mailed March 11, 1981. The United States District Court filing date is March 19, 1981.

Based upon same, the United States Court of Appeals for the Ninth Circuit erred in its determination.

CONCLUSION

Based upon the foregoing respectfully submitted contentions, Petitioner moves this Court to deny Respondent's Response, grant Petitioner's request for Writ of Certiorari, and grant such other and further relief deemed necessary and appropriate.

Respectfully submitted,

Benny Dixon

BENNY DIXON, Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME THIS 16 DAY OF SEPTEMBER, 1981.

My Commission Expires
November 4, 1982

My Commission Expires

NOTARY PUBLIC